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No. 76-1382

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN ARTHUR SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–3a) is reported at 544 F. 2d 903. The oral opinion of the district court (Pet. App. 6a–10a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4a) was entered on November 23, 1976. A timely petition for rehearing was denied on February 8, 1977 (Pet. App. 5a). On March 2, 1977, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to and including April 9, 1977. The petition was filed on April, 8, 1977, and was

granted on October 11, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a second trial of a defendant after the court, at the defendant's request, dismissed the indictment during trial on the ground that pre-accusation delay violated the Due Process Clause.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law; * * *.

2. The Criminal Appeals Act, 18 U.S.C. 3731, provides in relevant part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

3. Federal Rule of Criminal Procedure 12 provides in relevant part:

> (b) Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. * * * The following must be raised prior to trial:
>
> (1) Defenses and objections based on defects in the institution of the prosecution; * * *
>
> * * * * *
>
> (e) A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. * * *

STATEMENT

Respondent, a member of the Muskegon, Michigan, police force, was arrested on January 22, 1975, on a complaint charging him with two drug offenses. The complaint alleged that on September 24, 1974, respondent had distributed codeine (a derivative of opium), and that on January 22, 1975, he had distributed heroin. On March 5, 1975, he was indicted on these charges and on a charge of distributing cocaine on September 20, 1974 (A. 3–4). The September 20 transaction was the basis of Count I, the September 24 transaction the basis of Count II, and the January 22 transaction the basis of Count III. All of the transactions were alleged to violate 21 U.S.C. 841(a)(1).

Respondent moved before trial to dismiss Counts I and II on the ground that the delay between the commission of the offenses and the first accusation (five and one-half months for Count I and four months for

Count II) violated the Due Process Clause of the Fifth Amendment (A. 5–6).[1] The district court held a hearing on this motion (A. 7–14) and denied it, but without prejudice to renewal at a later time (A. 15).[2]

Respondent's trial began on December 1, 1975. The evidence presented by the prosecution showed that, on the dates charged in the indictment, respondent, a member of the narcotics unit of the Muskegon police force, had gone into the drug business for himself and was distributing drugs to Robert Jordan, an informant for the Drug Enforcement Administration (Tr. 11–32, 166–174).

At the close of the prosecution's case, respondent renewed his motion to dismiss Counts I and II because of pre-accusation delay (A. 16–18). He made that request shortly after Agent Stephen Young testified that the investigation of respondent had been continued to determine whether other police officers were involved in drug transactions, to ascertain the source of respondent's drugs, and to allow the purchase of drugs from respondent by a federal agent rather than by an informant (A. 16; Tr. 292–294). The court again denied this motion (A. 18). It also denied a motion for a judgment of acquittal, concluding that the testimony of Jordan created an issue for the jury (A. 19).

[1] The motion alleged that respondent was prejudiced because the delay prevented him and his witnesses from "accurately recollecting and reconstructing the events surrounding the offenses" (A. 5).

[2] The court also denied respondent's motion to sever the counts for separate trials (A. 15).

Respondent presented evidence tending to show that he dealt with Jordan only in the line of official duties. The theory of the defense was that Jordan had "set up" respondent so that Jordan would be able to traffic in drugs with less risk to himself. Respondent testified about the transactions of September 24 and January 22; he claimed, however, that he was unable to recall the events of September 20 (A. 21–24; Tr. 313–317, 323–324, 338–339, 353, 400–404, 515–519, 536).

After all the evidence had been received, respondent again moved to dismiss Counts I and II because of pre-accusation delay (A. 24–25). This time the district court granted the motion, ruling that Count I should be dismissed because intentional delay had prejudiced respondent. The prejudice, the court concluded, lay in respondent's inability to recall the events of September 20 (Pet. App. 6a–7a). The delay was impermissible, the court explained, because it was for the purpose of gathering evidence of further alleged crimes of respondent, which would give the prosecution a tactical advantage at the trial by making it less likely that the jury would believe respondent's explanation (*id.* at 8a).[3] The court also dismissed Count II.[4]

[3] *United States* v. *Lovasco*, No. 75–1844, decided June 9, 1977, establishes beyond serious dispute that the district court's ruling was erroneous. See note 8, *infra*.

[4] The district court's reasons for dismissing Count II are not clear. The court stated (Pet. App. 8a–10a) that respondent should have been offered additional assistance in carrying out his police tasks, that the jury would be entitled to agree with respondent's version of the events, that respondent might have forgotten important evidence, and that "a compromise verdict * * * may result if [respondent] were to be—had to stand trial all the way on the

The court submitted Count III to the jury, which returned a verdict of not guilty (Pet. App. 2a).[5]

The United States appealed, seeking reversal of the dismissals of Counts I and II. The court of appeals dismissed the appeal for want of jurisdiction (Pet. App. 1a–3a). The court concluded that the Double Jeopardy Clause bars an appeal by the United States from an order entered during a trial dismissing an indictment.

SUMMARY OF ARGUMENT

This case involves neither an acquittal, which would preclude a second trial of respondent, nor a mistrial at defense request, after which a second trial unquestionably would be permitted. It falls somewhere in between. The district court did not evaluate the evidence of respondent's guilt; it held, instead, that he could not be convicted whether or not he was guilty. This case thus presents the question whether a pre-verdict

three counts." Because the reasons for the district court's dismissal of Count II are not clear (the concern about prejudicial joinder would have supported an order granting a mistrial but not an order dismissing the indictment), we have not presented for decision by this Court any question concerning Count II of the indictment. We do not concede, however, that a second trial on Count II would have violated the Double Jeopardy Clause.

[5] The district court instructed the jury, among other things, that it could find a "reasonable doubt" about respondent's guilt if it concluded that Jordan was either an addict or an informant (Tr. 647). Because Jordan was admittedly an informant, this instruction, which we believe to be erroneous, may have contributed to the jury's decision to acquit. The Double Jeopardy Clause bars review of acquittals by the jury, however, even if they are based on erroneous instructions, and we did not appeal from the acquittal on Count III.

termination of a trial bars a second trial where the termination is neither an acquittal nor the functional equivalent of a mistrial.

When, during the course of a trial, an accused willingly surrenders his right to receive a verdict, this choice ordinarily removes any barrier to a second trial. *Lee* v. *United States,* No. 76–5187, decided June 13, 1977; *United States* v. *Dinitz,* 424 U.S. 600. That rule reflects the fact that the defendant's most important double jeopardy right, once a criminal trial has begun, is "to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States* v. *Jorn,* 400 U.S. 470, 486 (plurality opinion).

That interest is sufficiently weighty that a defendant who unsuccessfuly asserts his right to receive the verdict of the factfinder—*e.g.,* by opposing a mistrial declaration—may be retried only if it was manifestly necessary to end the first trial before verdict. But there is no need for special justification to "deprive" a defendant of a verdict he does not want to receive. Respondent's essential right was to receive a decision on his guilt or innocence. He elected, however, not to seek such a decision but instead to accept a termination of the trial for reasons unrelated to guilt or innocence. In such circumstances, weight must also be given to the important public interest in having a full and fair trial of the merits of criminal charges, and the Double Jeopardy Clause should not be held to bar a second trial if respondent was not entitled to the

relief he obtained when he accepted termination of the first trial.

To the extent this case is different from *Lee*, a second trial is even more appropriate here. In *Lee* a second trial was necessary because the prosecutor erred in drafting the information; here, we submit, the only error was made by the district court in granting respondent's motion to dismiss the indictment. If the government could retry Lee despite its negligence in drawing the original defective charge, then surely it should be permitted to retry respondent on what always has been a sufficient charge.

A defendent who desires to receive a decision on guilt without risking a second trial can do so by asking the court to submit the case to the jury and to postpone its legal ruling until after verdict. Once the case has been submitted, the defendant will receive a verdict of acquittal if one is forthcoming. If the jury should convict, the court then could resolve the defendant's legal objections without creating any danger that a second trial would be required. See *United States* v. *Wilson*, 420 U.S. 332. A defendant who insists on a pre-verdict resolution of his contentions prevents a final decision on guilt in a single trial, and it is not unfair to subject him to a second trial if the termination he obtained is improper.

Some of the Court's discussion in *Lee, supra,* slip op. 7, appears to assume that the critical question is whether the indictment was dismissed with prejudice. We believe that this passage, taken in context, should be understood simply as a reference to one character-

istic that differentiates true acquittals from other terminations. There is no logical basis for a rule that allows second trial after some dismissals but prohibits a second trial after others, even though the defendant has not been acquitted in either instance. The interests of a defendant in avoiding another trial are the same no matter what the reason for the termination of the first. In the present case, respondent would be exposed at a second trial to no greater expense or anxiety than Lee was, and the Court concluded that Lee's second trial was proper. The second trial is necessary here, as it was in *Lee,* to vindicate the interests of society in having the defendant's guilt or innocence resolved.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT FORBID A SECOND TRIAL WHEN THE FIRST HAS BEEN TERMINATED AT THE DEFENDANT'S REQUEST ON GROUNDS NOT AMOUNTING TO AN ACQUITTAL

A. THE DOUBLE JEOPARDY CLAUSE ERECTS AN ABSOLUTE BAR TO A SECOND PROSECUTION ONLY IF THE FIRST ENDS IN AN ACQUITTAL

Two competing principles dominate this Court's recent decisions concerning the constitutionality, under the Double Jeopardy Clause, of a second trial after the first has not ended in a finding of guilt by the factfinder. On the one hand, a second trial is impermissible if the first ends in an acquittal or its equivalent. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564.[6] On the other hand, when the first trial ends

[6] See also *Finch* v. *United States*, No. 76-1206, decided June 29, 1977 (decision that the statute alleged to have been violated is

at the defendant's request prior to a ruling on guilt or innocence, a second trial ordinarily may be held in order to vindicate the interests of society in having at least one decision on the defendant's guilt or innocence. See, *e.g.*, *Lee* v. *United States*, No. 76-5187, decided June 13, 1977; *United States* v. *Dinitz*, 424 U.S. 600.'

This case falls somewhere in between. It seems clear that the resolution of respondent's contention that pre-accusation delay violated the Due Process Clause did not amount to an "acquittal." The ruling did not represent "a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States* v. *Martin Linen Supply Co.*,

inapplicable to facts established by stipulation is unreviewable); *United States* v. *Jenkins*, 420 U.S. 358 (further factfinding proceedings barred after a bench trial ends in a decision that not all of the elements of the offense have been proved); *Fong Foo* v. *United States*, 369 U.S. 141 (retrial barred after district judge instructed the jury to return a mid-trial verdict of acquittal based on supposed prosecutorial misconduct and insubstantiality of prosecution evidence).

When the factfinder has made a finding of guilt, however, a subsequent acquittal may be set aside and the finding of guilt reinstated. *United States* v. *Morrison*, 429 U.S. 1; *United States* v. *Wilson*, 420 U.S. 332; *United States* v. *Jenkins*, *supra*, 420 U.S. at 365. See also *United States* v. *Rojas*, 554 F. 2d 938 (C.A. 9); *United States* v. *Allison*, 555 F. 2d 1385 (C.A. 7); *United States* v. *Calloway*, 562 F. 2d 615 (C.A.10); *United States* v. *Donahue*, 539 F. 2d 1131 (C.A. 8); *United States* v. *Burroughs*, 537 F. 2d 1156 (C.A. 4); *United States* v. *Cravero*, 530 F. 2d 666 (C.A. 5); *United States* v. *DeGarces*, 518 F. 2d 1156 (C.A. 2); *United States* v. *Cahalane*, 560 F. 2d 601, 603 n. 2 (C.A.3).

' An exception is recognized for the extraordinary case in which the defendant requests a mistrial in response to judicial or prosecutorial "overreaching." See *United States* v. *Dinitz*, *supra*, 424 U.S. at 611.

supra, 430 U.S. at 571. See also *United States* v. *Sisson*, 399 U.S. 267, 290 n. 19. The district court's decision did not evaluate the weight of the evidence against respondent; to the contrary, the court denied respondent's motion for a judgment of acquittal, concluding that the evidence presented a question for the jury to decide (A. 19). The court did not address the general issue of guilt or innocence; it did not evaluate the elements of the offense or determine whether the proof had been addressed to those elements. It held, instead, that respondent was entitled to be discharged whether or not he had committed a crime.

The district court did not contemplate, however, that respondent would be reprosecuted; it dismissed the indictment with prejudice because it believed that the Constitution absolutely barred respondent's conviction. Although the district court's decision was palpably erroneous,[8] we cannot say, as the Court said in

[8] The delay between the commission of the offenses and the formal accusation was less than six months, a period that is not even long enough to justify judicial inquiry. Respondent asserted only the most general sort of prejudice—fading memory (A. 5, 8, 25). A contention of this sort is inadequate to establish an entitlement to relief. And the prosecutor offered a number of justifications for the delay, including the need to protect the identity of an informant, the desirability of pursuing additional leads in the investigation to discover respondent's confederates and source of supply, and the fact that no grand jury was sitting for two months (A. 11–12, 16, 26–27). The district court found that the "principal motive" of the delay was "to gather evidence of further crimes" by respondent (Pet. App. 8a). We are aware of no case holding or even suggesting that delay for this purpose is improper, let alone unconstitutional. *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, therefore establishes that the brief delay did not violate any of respondent's rights.

Lee, that "the order entered by the District Court was functionally indistinguishable from a declaration of [a] mistrial" (slip. op. 7; footnote omitted).

This Court therefore must decide whether a dismissal that is neither an acquittal nor the functional equivalent of a mistrial bars a second trial.[9] In order to illuminate the considerations that bear on that question, we first discuss the nature of the double jeopardy interests implicated by terminations of trials in advance of a decision on the general issue of guilt or innocence.

The prohibition against multiple trials for the same offense is based on the special interests protected by the Clause:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. *United States*, 355 U.S. 184, 187–188, quoted in *Serfass* v. *United States*, 420 U.S. 377, 387–388. See also *Breed* v. *Jones*, 421 U.S. 519; *United States* v. *Jorn*, 400 U.S. 470, 479 (plurality opinion).

The special interests a criminal defendant has in the finality of a decision at trial that he did not commit the crime support the principle, which we have discussed above, that a true acquittal by the finder of facts is an absolute bar to a second trial. See *Forman* v. *United States*, 361 U.S. 416, 426. But these interests have never been thought to bar a second trial if the first trial does not end in an acquittal. When the first trial stops short of acquittal, whether a second trial may be held depends on a careful balancing of the defendant's interest in avoiding repetitious trials against the public's interest in "fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U.S. 684, 689.

A rule that a second trial for the same offense invariably violates the Clause "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy protection is aimed. • • • [T]he purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again." *Wade* v. *Hunter*, *supra*, 336 U.S. at 688–689. As Mr. Justice Harlan explained for the plurality in *United States* v. *Jorn*, *supra*, 400 U.S. at 483–484, "it is clear beyond question that

[9] There is no question here concerning the right of the United States to appeal, so long as the Double Jeopardy Clause would not preclude the holding of a second trial. In enacting the Criminal Appeals Act, 18 U.S.C. 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States* v. *Wilson*, *supra*, 420 U.S. at 337; *United States* v. *Martin Linen Supply Co.*, *supra*, 430 U.S. at 568. Even under the view expressed by Mr. Justice Stevens, concurring in the judgment in *Martin Linen*, the court of appeals had jurisdiction of this case because the dismissal of the indictment was not an "acquittal." See 430 U.S. at 576 n. 1.

the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense. * * * The determination to allow reprosecution in [some] circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error."

There are three common situations in which a second trial may be held when the first does not end in an acquittal. The first is when a trial ends in a conviction that is set aside because of error. *United States* v. *Ball*, 163 U.S. 662; *United States* v. *Tateo*, 377 U.S. 463.[19] The second is when a trial ends at the defendant's request because of trial error or because of a defect in the institution of the proceedings. *Lee* v. *United States, supra; United States* v. *Dinitz, supra.* The third is when a trial has been terminated, even over the defendant's vigorous objection, because there is "manifest necessity" to do so or the "ends of public justice" so require. *Illinois* v. *Somerville*, 410 U.S. 458; *United States* v. *Perez*, 9 Wheat. 579.

In each of these situations the defendant is subjected to all the expense, anxiety, and risk of conviction that a second trial entails. All of these cases are governed by a single controlling principle: once a trial begins, the accused has a valued right, although not an absolute one, "to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States* v. *Jorn, supra,* 400 U.S. at 486 (plurality opinion). A second trial is permitted when it would not unjustifiably imperil this right. (1) When the defendant receives the verdict of the factfinder and is convicted, a second trial could not "deprive" him of the opportunity to receive that verdict. (2) A defendant whose trial is terminated before verdict at his own request is also not deprived of this valued opportunity; rather, he exercises control over the trial to choose an outcome he values more highly than a resolution of the general issue of his guilt or innocence. And (3) circumstances amounting to "manifest necessity" provide sufficient reason to deprive a defendant of the opportunity for a verdict even when he desires to receive the factfinder's decision. Although in all of these cases the defendant is tried more than once, retrial is necessary in order to have one fair adjudication of guilt or innocence. The public has a strong interest in obtaining such an adjudication, and the public's interest is sufficiently important to justify requiring defendants to stand trial twice.

Double jeopardy analysis balances against this public interest those of the defendant in obtaining a verdict if he wants one and retaining an acquittal if he gets one. Neither of those interests is, however, impli-

[19] This rule is thoroughly discussed in our brief in *Burks* v. *United States*, No. 76-6528, argued November 28, 1977. We have furnished counsel for respondent with a copy of that brief.

cated here. Respondent sought and received a dismissal for reasons unrelated to his guilt or innocence. In doing so he did not receive an acquittal, nor was he deprived of the opportunity to do so. Respondent may be tried a second time if, as we contend, he was not entitled to the dismissal he sought and received.[11]

B. RESPONDENT'S MOTION TO DISMISS THE INDICTMENT REMOVED ANY BAR TO A SECOND TRIAL

1. In the absence of judicial or prosecutorial overreaching, a motion to terminate the trial before a verdict on the general issue removes any double jeopardy objection to a second trial

"'[W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.'" *United States* v. *Dinitz, supra,* 424 U.S. at 607. This is so because the "important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [judicial or prosecutorial] error" (*id.* at 609; footnote omitted). If the defendant, for reasons he deems sufficient, exercises that control by asking to terminate the proceedings prior to any resolution of the general issue of

[11] Of course, if the district court's ruling on the issue of pre-indictment delay were correct, the government's appeal would fail on the merits, and petitioner would be immune from reprosecution under principles of *res judicata.*

guilt or innocence, the Double Jeopardy Clause does not prohibit the holding of a second trial. This principle applies, moreover, whether the defendant seeks a mistrial or an order dismissing the indictment. *Lee* v. *United States, supra.*

Lee controls this case. In *Lee* the defendant was charged with theft, and he moved after the beginning of his trial (but before the attachment of jeopardy) to dismiss the information because of a drafting error. The district court took the motion under advisement until it could study the matter, and it proceeded to hear evidence. After all of the evidence had been heard, the court dismissed the information because of the defect. This Court held that the Double Jeopardy Clause did not bar a second trial on a corrected charge, because the information had been dismissed on Lee's own motion and the dismissal did not resolve the general issue of guilt or innocence.

Here, as in *Lee,* the defendant desired to avoid a resolution of the general issue, and in accordance with his wishes there was no decision on the merits. The only obstacle to conviction was a purported flaw in the institution of the proceedings. The "proceedings were terminated at the defendant's request and with his consent" (*Lee, supra,* slip op. 10). "Counsel for [respondent] made no effort to withdraw the motion" pending a return of a verdict (*ibid.*). "And counsel offered no objection when the court * * * decided to terminate the proceedings without having entered any formal finding on the general issue" (*ibid.*). It fol-

lows that here, as in *Lee*, the Double Jeopardy Clause does not bar a second trial.[12]

There is, however, language in *Lee* that might be thought to look in the contrary direction. The Court stated (slip op. 7) that "[t]he critical question is whether the order [terminating the trial] contemplates an end to all prosecution of the defendant for the offense charged. * * * Where a midtrial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, * * * [a] further prosecution is barred by the Double Jeopardy Clause." In the present case the district court's order contemplated an end to prosecution, and it was granted on the ground that respondent "simply cannot be convicted of the offense charged." We submit, however, that this portion of the Court's discussion in *Lee* did not pertain to a case such as the present one.

The first, and most obvious, distinction is that *Lee* involved the institution of a new criminal proceeding following the termination of the first trial. Had Lee's

[12] *Lee* also establishes that it does not matter whether the court dismisses an indictment after hearing evidence, so long as the dismissal does not resolve the general issue of guilt or innocence. In *Lee* itself the court heard all of the evidence before dismissing the indictment. The court of appeals' statement (Pet. App. 2a) that the Double Jeopardy Clause uniformly bars a second trial when the dismissal is "based upon facts established by evidence received at trial" is the precise position rejected by this Court in sustaining the government's right to appeal in *United States* v. *Wilson*, 420 U.S. 332. Compare *id.* at 345 with 492 F. 2d 1345, 1347–1348 (C.A. 3). Cf. *United States* v. *Sanford*, 429 U.S. 14 (second trial permissible even though the indictment had been dismissed after trial on the basis of evidence received at trial; see 503 F. 2d 291, 293 (C.A. 9)).

first trial terminated on the ground that he "simply [could not] be convicted of the offense charged," ordinary principles of *res judicata*, embodied in the Double Jeopardy Clause, would have barred the institution of new proceedings against him involving the same offense.[13] The dismissal in *Lee* was without prejudice to a possible further attempt to convict him, however, and a second trial therefore was permitted by *res judicata* principles.

The charges against respondent were dismissed with prejudice because the district court concluded that he could not be convicted of the offense charged, and, as the language in *Lee* indicates, a new proceeding involving the same offense would have been barred by double jeopardy if the district court's disposition had been permitted to become final. But the appeal that the government has pursued here prevented the district court's decision from becoming final. It therefore has no *res judicata* effect, and there is no double jeopardy barrier to the appeal under the language in *Lee*.

In addition, it seems plain that the Court was referring at page 7 of the *Lee* opinion only to dismissals that resolved the general issue of guilt or innocence (*i.e.*, to acquittals). The Court was discussing *United States* v. *Jenkins*, 420 U.S. 358, a case that involved a

[13] *United States* v. *Oppenheimer*, 242 U.S. 85, could be read as suggesting that the Double Jeopardy Clause does not require the application of the doctrine of *res judicata* to criminal cases, since the principle was applied there without acknowledgment of any constitutional compulsion to do so. We seriously doubt, however, that the Clause would permit statutory or judicial abolition of *res judicata* principles in criminal cases. See *Ashe* v. *Swenson*, 397 U.S. 436.

resolution of the general issue, and it stated that its discussion was a refinement of *Jenkins*. The Court applied the *Lee* discussion in *Finch* v. *United States*, No. 76–1206, decided June 29, 1977, another bench trial in which the district judge resolved the general issue in favor of the defendant. *Jenkins*, *Finch*, and the discussion in *Lee* are examples of the principle that a true acquittal of the defendant is final, unless there also has been a finding of guilt that can be reinstated.

Acquittals always have occupied a special place in our double jeopardy jurisprudence, and they have been governed by unique rules. See *United States* v. *Martin Linen Supply Co.*, *supra*. To the extent it is applicable at all to cases involving appeals, the discussion in *Lee* should, we submit, be understood as an explanation of one of the critical differences between unreviewable acquittals and other kinds of rulings that terminate a trial.

There is no reason for an inflexible rule that would prohibit a second trial even though the defendant had not been acquitted. The interests of a defendant in avoiding a second trial are the same no matter what the reason for the termination of the first short of an acquittal. Respondent would be exposed, at a second trial, to no greater expense or anxiety than Lee was, yet this Court concluded that Lee's second trial was proper. If the district court's dismissal was erroneous, a second trial is necessary here, as it was necessary in *Lee*, to permit the *first* decision on the defendant's guilt or innocence.

The first trial of respondent did not end because of prosecutorial or judicial overreaching; it ended, as in

Lee, with a favorable judicial response to a motion the defendant himself had made. As in *Lee*, the defendant could have avoided the mid-trial termination, and obtained the verdict of the jury, simply by asking the Court to postpone a final ruling on his claim of impermissible delay. If there is any meaningful difference between this case and *Lee*, it is that the error requiring a second trial in *Lee* was made by the prosecutor, who drafted a defective information; here the only error was made by the district court in granting respondent's motion to dismiss the indictment.[14] It would be a perverse rule that rewarded defendants with immunity from further prosecution when they lead district judges into error, while subjecting to a second trial defendants, such as Lee, whose first trial was infected with an error of the prosecutor's making that made dismissal appropriate. If the government could retry Lee despite its negligence in drawing the original defective charge, then surely it should be permitted to retry respondent on what has always been a sufficient charge.

To put the matter slightly differently, we perceive two sorts of arguments that might be advanced by a defendant in a case such as the present one. The first argument is that the defendant has an indefeasible interest in retaining a favorable judgment, simply because it was favorable. But this Court held in

[14] If the dismissal was correct, the Double Jeopardy Clause would not bar the government's appeal either, since the appeal would simply result in an affirmance, and no second trial of respondent would ensue.

United States v. *Wilson*, 420 U.S. 332, that a defendant has no vested interest in retaining the benefits of legal errors. "Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law" unless he would be subjected to a second trial and that trial would violate the Clause (420 U.S. at 345).

The pertinent interest, then, is in avoiding a second trial, not in preserving a favorable decision. This is the second argument. But *Lee* held that a defendant who seeks a mid-trial dismissal of the indictment may be tried a second time. *Wilson* and *Lee*, taken together, thus demonstrate that none of respondent's interests would be offended by further proceedings in this case.[15]

[15] The Court explained in *Wilson*, *supra*, 420 U.S. at 352 (footnote omitted), that a second trial is objectionable in part because it "would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses of his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal." In the present case, however, there was no verdict of acquittal, and the prosecutor did not "fail" with the first fact-finder. Although it is conceivable that the prosecutor might strengthen his case at a second trial, this is always a possibility when a second trial is held. Yet, as *Lee* and *Dinitz* establish, second trials are permissible after a defendant has exercised his option to end a trial prior to verdict. Although the second trial may be costly to the defendant, he had the option to press on to verdict in the first trial and, for reasons satisfactory to himself, decided not to do so.

We submit, in sum, that when a defendant seeks and obtains a mid-trial dismissal for reasons that do not amount to an acquittal, he may be tried a second time if he led the district court into error, even though the error is one that, if not corrected on appeal, would bar further prosecution.[16] The defendant's desire to avoid even one ruling on guilt or innocence, and the costs to him of a second trial, must be subordinated to "the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter*, *supra*, 336 U.S. at 689. The public has an interest in exposing defendants to at least one decision on guilt, and defendants should not be permitted to defeat that interest by injecting error into a trial, halting it short of verdict, and then complaining that exposure to another trial would be costly to themselves. The cost is of their own making.

2. A defendant may safeguard his legitimate interests by going to verdict and saving his objections for post-verdict resolution

One objection to our submission might be that it is unfair to require a defendant to submit to the risk of two trials as the cost of obtaining resolution of his trial motions. This objection would be unfounded.

[16] Our argument is supported by the principle that the district court's characterization of its ruling is not dispositive. See, e.g., *United States* v. *Jorn*, *supra*, 400 U.S. at 478 n. 7; *United States* v. *Sisson*, *supra*, 399 U.S. at 270, 286–287. To give conclusive force to the judge's subjective intention to dismiss an indictment with prejudice would be, in effect, to give conclusive force to the judge's description of his own decision. The interests of the defendant in avoiding a second trial are not affected by the judge's subjective intentions with respect to reprosecution, and it would be pointless to let those intentions become self-fulfilling prophesies.

The rule we espouse—that a defendant who obtains a pre-verdict termination of his first trial may not block a retrial on double jeopardy grounds—does not impair the defendant's "valued right" to obtain a verdict at the first trial, does not impair the finality of any verdict he obtains, and does not subject him to pressure of any sort. Far from it; a defendant who desires to obtain the jury's verdict may do so simply by asking the judge to postpone his legal ruling until after verdict, thereby receiving an acquittal by the factfinder if one should be forthcoming."

This strategy will safeguard all of the defendant's interests. If he should be found guilty, he would be entitled to a post-verdict ruling on his claim of legal error—in the present case, by a motion for arrest of judgment pursuant to Fed. R. Crim. P. 34. If the district court should agree with his assertion of error, it would set aside the verdict. The prosecution then could appeal, and the legal issues could be resolved without risk of a second trial. *United States* v. *Wilson*, 420 U.S. 332. If the court should reject the claim of error, the defendant could appeal and obtain a definitive resolution. No matter what the jury and the district court do, the defendant would be exposed to but a single trial.

Saving legal issues for post-verdict decision preserves the accused's right to receive an acquittal by

[17] Submitting the case to the jury would have been almost costless to respondent. All the evidence already had been received, and Count III was submitted to the jury. Submitting Count I as well would not have added to the expense or travail of trial.

the factfinder at a single trial; it also minimizes his exposure to multiple trials by eliminating any significant chance that a retrial might be required by an erroneous mid-trial termination. If, disdaining the opportunity to receive the verdict of the factfinder, the accused seeks and receives a mid-trial termination, it is not unfair to hold a second trial if the termination was improper, or if the error leading to the termination can be corrected.

Indeed, we believe that the district court lacked authority to make a mid-trial ruling on respondent's assertion of unconstitutional pre-accusation delay. Respondent moved prior to trial to dismiss the indictment. Although the district court should have denied the motion out of hand in light of the very brief period of delay involved, it was in any event correct in not granting the motion prior to trial, because the success of such a motion depends on the defendant's ability to demonstrate significant prejudice from the delay—a matter that can ordinarily be evaluated only after the evidence has been heard at trial. See *United States* v. *Marion*, 404 U.S. 307, 326.[18]

Having deferred a final decision on the motion, however, the court lacked authority to grant respondent's motion in mid-trial, regardless of its merit, because Fed. R. Crim. P. 12(e) provides that a motion

[18] We argued at pages 40–48 of our brief in *United States* v. *Lovasco*, No. 75–1844, decided June 9, 1977, that deferral is the better course. We furnished a copy of that brief to counsel for respondent at the time our petition was filed.

made before trial "shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, *but no such determination shall be deferred if a party's right to appeal is adversely affected*" (emphasis supplied). Most motions to dismiss because of pre-accusation delay are not readily susceptible of pre-trial determination, and thus there usually is "good cause" for deferral, but under Rule 12(e) the court should have deferred decision until after verdict if there was any doubt about the government's right to appeal from a mid-trial ruling.

Rule 12(e) was designed in major part to protect the government's right to appeal, conferred by 18 U.S.C. 3731, against mid-trial decisions that might create double jeopardy bars to further proceedings. The Advisory Committee's proposed Rule 12(e) would have allowed mid-trial decisions without limit. Congress modified the proposal because it "believe[d] that the rule proposed by the Supreme Court could deprive the government of its appeal rights" (see H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 8 (1975)).[10]

We have argued above that the mid-trial decision on respondent's motion did not create a double jeopardy bar to a further trial. But this difficult question could have been eliminated by postponement of the district court's decision. Respondent contends that the mid-trial decision obliterated the United States' right

[10] The amended Rule 12(e) became effective December 1, 1975, the first day of respondent's trial.

to appeal; if he is even arguably correct, the court should not have decided his motion in mid-trial. This is not a case like *United States* v. *Martin Linen Supply Co., supra,* in which the district court rendered a decision explicitly authorized by the applicable rules." Here, to the contrary, given the rule in the Sixth Circuit that pre-verdict dismissals are not appealable (Pet. App. 2a-3a), the district court was required by the rules not to act as and when it did. Respondent, who induced the court to grant his motion without submitting the case to the jury, cannot seek to profit from the error he brought about."

Respondent gambled that his legal theory was correct. He sought and received a decision on that theory before receiving a decision on the general issue of guilt or innocence. Should the court of appeals agree with respondents' argument that he was subjected to unconstitutional pre-accusation delay, it would affirm the judgment, and respondent would not be exposed to another trial. But if, as we contend, the district court erred—once in ruling on the motion before ver-

[9] See 430 U.S. at 573-575. *Martin Linen* also presents a special situation because it involved an acquital. See pages 9-10, 19-20, *supra*.

[11] A rule barring retrial after an erroneous dismissal of the indictment with prejudice would disserve "the purpose of law to protect society from those guilty of crimes" (*Wade* v. *Hunter*, *supra*, 336 U.S. at 689) without securing to defendants any advantage that they could not obtain equally well by waiting until after verdict to press arguments such as pre-accusation delay. Permitting retrial doubtless would encourage defendants to save some arguments to be raised after verdict, but there is no reason not to do so especially when doing so would avoid second trials and serve the important societal interest to which this Court referred in *Wade*.

dict, and again in granting it—respondent should be tired once more in order to vindicate the interest of society in obtaining one adjudication of his guilt or innocence. Respondent's ability to persuade the district court to err in his favor, and to pretermit resolution of his guilt or innocence, should not create a constitutional bar to reprosecution.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions that the court of appeals decide the appeal on its merits.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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